Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v Dae Hanguru Infra Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(W)-431–03 OF 2017 AND D-02(NCVC)(W)-499–03 OF 2017
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
6 MARCH 2020

Contract — Formation — Valid and binding agreement — Plaintiff sued defendants for breach of contract — Whether there was enforceable contract — Whether there was consensus ad idem — Whether plaintiff entitled to compensation for breach of contract — Contracts Act 1950

Dae Hanguru Infra Sdn Bhd ('the plaintiff') had brought an action against Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd ('the first defendant') and Perbadanan Menteri Besar Kelantan ('the second defendant') for breach of contract regarding the construction of the Kota Bharu-Kuala Krai Highway Project ('KBKK Project'). In submissions, the parties had heavily relied upon two documents namely the letter of intent dated 8 October 2012 and letter of acceptance dated 31 October 2012. At the end of the case the High Court had allowed the plaintiff's claim against the first defendant and dismissed the plaintiff's claim against the second defendant. The court, inter alia, found that there was a contract between the parties and the incorporation of the plaintiff as the turnkey contractor for the KBKK project on behalf of Consortium Daelim JV ('CDJV') was acceptable to the first defendant. Aggrieved by the decision, the plaintiff and the first defendant had filed two separate appeals. The issues for the court's determination was whether there was an enforceable contract and whether the plaintiff was entitled to compensation for breach of contract.

Held, allowing the first defendant's appeal with costs, and dismissing the plaintiff's appeal with costs:

(1) The construction agreements and/or contracts have its own peculiarity, practice and acceptance. There are different types of construction contracts. Big projects will have multiple contracting parties. To avoid the strict provision of the law, all parties if they have agreed to arbitration clause, the arbitrators will have a mandate to treat various parties as having an intention to create legal obligations as well as consensus ad idem, though not all parties have agreed or signed all agreements. In

essence, the privity of contract is given lesser importance and arbitrators would take a holistic approach (see para 26(a)).

(2) The most crucial document was the letter of intent dated 8 October 2012 and letter of acceptance dated 31 October 2012. The court agreed with the first defendant that if there was any agreement and/or contract in respect of the project, it was between the consortium (which consisted of several members) and the first defendant. More importantly, the plaintiff was never a member of the consortium at the material time as the plaintiff was yet to be incorporated. Thus, the issue of 'consensus ad idem' would be lacking to give the status of a contract to some loose arrangements. The fact that, subsequently the plaintiff was nominated as the consortium's contractor to implement the project would not regularise the lack of consensus ad idem principle which was essential to sustain a valid contract (see para 26(b)).

(3) It ought to be noted that there was an attempt to substitute the consortium for the plaintiff as the contracting party. However, it was not successful and there was also no clear evidence of novation according to law (see para 26(c)).

(4) On the totality of the evidence and the preliminary jurisprudence, the plaintiff had not established that there was a valid and enforceable contract under the law to seek the relief as prayed by the plaintiff. In addition, the plaintiff's prayer was focused on an enforceable contract and did not mention lesser form of agreements where some payments could be made under other heads recognised under the Contracts Act 1950 (see para 26(d)).

[Bahasa Malaysia summary

Dae Hanguru Infra Sdn Bhd ('plaintif') telah memfailkan tuntutan terhadap Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd ('defendan pertama') dan Perbadanan Menteri Besar Kelantan ('defendan kedua') kerana melanggar kontrak mengenai pembinaan Projek Lebuhraya Kota Bharu-Kuala Krai ('Projek KBKK'). Dalam penghujahan, pihak-pihak sangat bergantung kepada dua dokumen iaitu 'Letter of Intent' bertarikh 8 Oktober 2012 dan 'letter of acceptance' bertarikh 31 Oktober 2012. Di akhir kes, Mahkamah Tinggi telah membenarkan tuntutan plaintif terhadap defendan pertama dan menolak tuntutan plaintif terhadap defendan kedua. Mahkamah, antara lain, mendapati bahawa terdapat kontrak antara pihak-pihak dan penubuhan plaintif sebagai kontraktor turnkey untuk projek KBKK bagi pihak Consortium Daelim JV ('CDJV') dipersetujui oleh defendan pertama. Terkilan dengan keputusan tersebut, plaintif dan defendan pertama telah memfailkan dua rayuan berasingan. Isu-isu untuk penentuan mahkamah adalah sama ada terdapat kontrak yang dapat dilaksanakan dan sama ada plaintif berhak mendapat pampasan kerana melanggar kontrak.

Diputuskan, membenarkan rayuan defendan pertama dengan kos, dan menolak rayuan plaintif dengan kos: A

(1) Perjanjian dan/atau kontrak pembinaan mempunyai keunikan, amalan dan penerimaannya tersendiri. Terdapat pelbagai jenis kontrak pembinaan. Projek besar akan mempunyai banyak pihak yang berkontrak. Untuk mengelakkan ketetapan undang-undang yang ketat, jika semua pihak telah setuju untuk klausa arbitrasi, para penimbang tara akan mempunyai mandat untuk menganggap pihak-pihak sebagai mempunyai niat untuk mewujudkan kewajiban undang-undang dan juga consensus ad idem, walaupun tidak semua pihak telah setuju atau menandatangani semua perjanjian. Pada hakikatnya, hubungan kontrak diberi kepentingan yang lebih rendah dan penimbang tara mengambil pendekatan holistik (lihat perenggan 26(a)). B C

(2) Dokumen yang paling penting adalah 'letter of intent' bertarikh 8 Oktober 2012 dan 'letter of acceptance' bertarikh 31 Oktober 2012. Mahkamah bersetuju dengan defendan pertama bahawa jika ada perjanjian dan/atau kontrak berkenaan dengan projek tersebut, perjanjian tersebut adalah di antara konsortium (yang terdiri daripada beberapa anggota) dan defendan pertama. Lebih penting lagi, plaintif tidak pernah menjadi anggota konsortium pada masa yang material kerana plaintif belum diperbadankan. Oleh itu, isu 'consensus ad idem' tidak akan memberikan status kontrak kepada beberapa pengaturan yang longgar. Fakta bahawa, kemudiannya plaintif dilantik sebagai kontraktor konsortium untuk melaksanakan projek tersebut tidak dapat memperbetulkan prinsip kekurangan 'consensus ad idem' yang penting untuk mengekalkan kontrak yang sah (lihat perenggan 26(b)). D E F

(3) Harus diingat bahawa terdapat usaha untuk mengganti konsortium dengan plaintif sebagai pihak yang berkontrak. Namun, itu tidak berhasil dan tidak ada bukti yang jelas tentang novasi menurut undang-undang (lihat perenggan 26(c)). G

(4) Berdasarkan keseluruhan keterangan dan prinsip perundangan awalan, plaintif gagal membuktikan bahawa terdapat kontrak yang sah dan dapat dilaksanakan di bawah undang-undang untuk mendapatkan relif seperti yang dimohon oleh plaintif. Di samping itu, permohonan plaintif difokuskan pada kontrak yang dapat dilaksanakan dan tidak menyebut bentuk perjanjian yang lebih rendah di mana beberapa pembayaran boleh dibuat di bawah tajuk lain yang diakui di bawah Akta Kontrak 1950 (lihat perenggan 26(d)).] H I

Cases referred to

Astra Trust v Adams and Williams [1969] 1 Lloyd's Rep 81 (refd)
Biring v Lightning Windows [1986] CLY 387 (refd)

British Steel Corp v Cleveland Bridge and Engineering Co Ltd [1984] 1 All ER 504, CA (refd)
Chinook Aggregates Ltd v Abbotsford (District) [1989] 35 CLR 241, CA (refd)
Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v Helsingin kaupunki [2004] All ER (EC) 87 (refd)
Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] WLR 295, CA (refd)
Cranleigh Precision Engineering Ltd v Bryant [1964] 3 All ER 289, QBD (refd)
Eccles v Bryant and Pollock [1948] Ch 93; [1947] 2 All ER 865, CA (refd)
Hall & Towse South Ltd v Ivory Gate Ltd (1997) 62 ConLR 117, QBD (refd)
Hoorobin v Majestic Hotel (Chelternham) Ltd [1973] 227 Estates Gazette 993 (refd)
Jarvis Interiors Ltd v Galliard Homes Ltd [2000] BLR 33, CA (refd)
Jones v Daniel [1894] 2 Ch 332, ChD (refd)
Keneddy v Lee [1817] 3 Mer 441 (refd)
Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd [1989] 1 All ER 785, CA (refd)
Lezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 Qd R 350 (refd)
Lim Hong Liang v Tan Kim Lian @ Tan Kim Leng & Anor [1997] 5 MLJ 157, HC (refd)
Lion Apparel Systems Ltd v Firebuy Ltd [2007] EWHC 2179 (refd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)
Okura & Co Ltd v Navara Shipping Corpn SA [1982] 2 Lloyd's Rep 537, CA (refd)
Perry v Suffields Ltd [1916] 2 Ch 187, CA (refd)
Pym v Campbell (1856) 119 ER 903; (1856) 6 E & B 370 (refd)
Renard Constructions (ME) Pty Ltd v Minister for Public Works [1992] 33 ConLR 72, CA (refd)
SIAC Construction Ltd v Mayo County Council [2002] All ER (EC) 272 (refd)
Smith v Butler [1900] 1 QB 694, CA (refd)
The Moorcock [1889] 14 PD 64, CA (refd)
Turriff Construction Ltd Regalia Knitting Mills Ltd [1971] 9 BLR 20, QBD (refd)
Von Hatzfeldt-Wildenburg v Alexander [1912] 1 Ch 284, ChD (refd)

Legislation referred to

Contracts Act 1950
Specific Relief Act 1950

Appeal from: Civil Suit No MT(1)-22-NCVC-5–01 of 2014 (High Court, Kota Bharu)

Robert Lazaar (Azlan Sulaiman and TT Toi with him) (Azmi & Assoc) for the appellant.
Cyrus Das (S Selvarajah, R Ramanathan and James Lopez with him) (Fernandez & Selvarajah) for the respondent.

Hamid Sultan JCA:

[1] There are two appeals before us. One is by the first defendant in the High Court (Appeal No 431) and the other by the plaintiff (Appeal No 499).

[2] The appeals relate to the construction agreement and/or contract. The focus of the dispute essentially was whether there was an enforceable contract and whether the plaintiff is entitled to compensation for breach of contract. The quantum involved related to the project was in billions.

PRELIMINARY JURISPRUDENCE TO APPRECIATE THE ISSUES IN THIS CASE

[3] It is now well established that the Malaysian Contracts Act 1950 ('the CA 1950') only recognise an enforceable contract to provide the reliefs as to compensation, damages, etc under various provisions of the Act. Specific performance and other reliefs can be obtained under the Specific Relief Act 1950. In case of agreements, some reliefs are mentioned in the in the CA 1950. However, if elements of uncertainty, duress or those which lack *consensus ad idem* exist, the contract will not be recognised at all by the courts (see *Janab's Key To Law Practice and Legal Remedies* (2nd Ed) pp 1–18).

[4] Under the common law, the courts at times will struggle to give effect to an oral agreement and in some case contracts. That is not the position in our Contract Acts, though court recognises the oral contract subject to credible oral evidence between the parties supported by strong corroborative evidence and/or circumstances. Oral agreements or part with corporate organisation are not easily recognised by courts (see *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212).

[5] The distinction between an agreement and contract are many. In essence, all contracts are agreements but not all agreements are contracts. Anything less than a contract may need the support of the provision of the Specific Relief Act 1950 to provide relief for breach of an agreement. If it is a contractual breach, the right to relief is of right. However, if it is an agreement not capable of being construed as a prima facie contract, the reliefs for breach becomes precarious as well as limited. For example, under a breach of agreement one may only recover money paid or advance in a limited sense as opposed to breach of contract.

[6] To put it mildly, incohate agreements or what can be called as 'coffee shop' agreements have a chance to be enforced at common law but may fail under the Contracts Act. In addition, 'coffee shop' agreements involving multiple parties and companies will not succeed even at common law because of the strict requirement of 'consensus ad idem'. When it comes to a proper construction agreements and/or contracts, it is now a practice to include arbitration clause. This is so because of the technicalities involved in construction disputes and the jurisprudence that has been developed which is now specifically called 'construction law'.

[7] 'Coffee shop' agreements will not have arbitration provision and when it relates to millions or billions without proper written agreements and/or contract with arbitration clause as per the industry practice, it would at this time and era means there was no intention to create legal obligations at that stage and the agreements are subject to other terms and condition to be approved not only by the parties but also all relevant authorities.

CONTRACTS AND CONTRACT DOCUMENTS

[8] As a general rule, the law of contract strictly applies to contract documents. However, it is not unusual to find judicial decisions in construction cases to pave way for jurisprudence related to construction practice and procedure.

LETTER OF INTENT

[9] A letter of intent in construction contract may create legal obligation for any acts done in relation to the letter of intent, notwithstanding the contract has not been finalised (see *Hall & Towse South Ltd v Ivory Gate Ltd* (1997) 62 ConLR 117 at p 118). In *Turriff Construction Ltd and Turriff Ltd v Regalia Knitting Mills Ltd* [1972] EGD 257, it was held on the facts that the employers' letter of intent had the effect to reimburse the contractor's preliminary expense, at any event. The same may not apply to a 'letter of comfort'. For example, in *Kleinwort Benson Ltd v Malaysia Mining Corpn Bhd* [1989] 1 All ER 785, a letter of comfort issued by the holding company to its subsidiary in respect of a loan taken by the subsidiary and repayment thereof, was held that it did not amount to a contractual obligation to the tender and in consequence is not enforceable.

LETTER OF ACCEPTANCE

[10] To identify offer and acceptance in building contracts has become extremely challenging when various parties are involved and there are prolonged negotiations of terms and condition and/or coupled with some

performance, etc. by parties. The negotiations may not just be writing or oral but by way of letters, whatsapp, email, etc. It is now well established that the courts will consider all negotiations evidence holistically to establish whether at some point of time an agreement has been reached (see *Keneddy v Lee* [1817] 3 Mer 441; *Perry v Suffields Ltd* [1916] 2 Ch 187; *Cranleigh Precision Engineering Ltd v Bryant* [1964] 3 All ER 289).

[11] The court may also rule that at some point of time, a recession or variation took place. It all depends on the facts and circumstances of the case and it may be difficult to predict the decisions of the court in all stages including final appeal. Thus, the modern approach to the problem may be to agree to arbitration on such disputes which may not have an arbitration clause in the agreement per se to avoid costs and expense and prolonged trial. One way to ensure that the arbitration clause will be in place is to start the negotiation itself by stating that if any disputes arising from the communications, it is ought to be settled by mediation or arbitration and parties renounce their right to litigation.

FAIRNESS RULE

[12] The concept of fairness rule is not strictly part of common law jurisprudence related to law of obligations. This rule has some nominal exception under the common law where courts to a minimum extend read into the contract of the trade practices, etc (see *The Moorcock* [1889] 14 PD 64). The fairness rule can be seen in constructions contract where the courts in relation to tender had held that there is a duty to treat all bidders fairly and not to give any of them an unfair advantage over others (see *Chinook Aggregates Ltd v Abbotsford (District)* [1989] 35 CLR 241, Can CA). Some judgments in this area have gone to the extent of saying that: (a) there is in existence in all contracts a duty upon the parties of good faith and fair dealing in its performance of the contractual obligations (see *Renard Constructions (ME) Pty Ltd v Minister for Public Works* [1992] 33 ConLR 72, NSW CA); (b) contract documents or the tender notice must comply with the fundamental principles of equal treatment, no-discrimination and transparency (see *Concordia Bus Finland Oy Ab (formerly Stagecoach Finland Oy Ab) v Helsingin kaupunki* [2004] All ER (EC) 87 at p 123). The judgments in this area of law is in line with the corporate jurisprudence related to accountability, transparency and good governance (see *SIAC Construction Ltd v Mayo County Council* [2002] All ER (EC) 272 at p 285; *Lion Apparel Systems Ltd v Firebuy Ltd* [2007] EWHC 2179 (Ch)).

A SUBJECT TO CONTRACT

[13] Terms and conditions communicated during the negotiation of an agreement with a proviso, 'subject to contract' may not lead to a final contract. At common law, it is well established in sale of land, until formal contracts are exchanged parties are not bound (see *Eccles v Bryant and Pollock* [1948] Ch 93; [1947] 2 All ER 865; *Hoorobin v Majestic Hotel (Chelternham) Ltd* [1973] 227 Estates Gazette 993).

[14] It is well established that if the finalised terms is sufficient to conclude, the contract, the phrase subject to contract, may be superfluous. In *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at pp 288–289, Parker J observed:

> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition of terms of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored.

[15] This area of law is nebulous and fact centric and cannot purely be assessed by court's decisions per se. Judicial precedent on the law may play a lesser role when the facts are not the same (see *Jarvis Interiors Ltd v Galliard Homes Ltd* [2000] BLR 33 (CA); *Okura & Co Ltd v Navara Shipping Corpn SA* [1982] 2 Lloyd's Rep 537 (CA)).

G CONDITION PRECEDENT

[16] If an agreement contains condition, precedents to be fulfilled first then the contractual obligation of the other party will not commence until the condition precedent is satisfied (see *Astra Trust v Adams and Williams* [1969] 1 Lloyd's Rep 81). If the condition precedent is fulfilled within the stipulated time, the agreement may come to an end with or without right to sue for damages. Again, it all depends on the terms as well as the facts of the case (see *Pym v Campbell* (1856) 119 ER 903; (1856) 6 E & B 370; *Biring v Lightning Windows* [1986] CLY 387; *Smith v Butler* [1900] 1 QB 694 (CA)).

I QUANTUM MERUIT

[17] It is not unusual in construction claim to make a claim on quantum meruit' basis for work done in the event there is no enforceable agreement (see

Lezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 Qd R 350 at p 361). In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, Goff J observed:

> In my judgment, the true analysis of the situation is simply this. Both parties confidently expected a formal contract to eventuate. In these circumstances, to expedite performance, under the anticipated contract, one requested the other to commence the contract work, and the other complied with that request. If thereafter, as anticipated, a contract was entered into, the work done as requested will be treated as having been performed under that contract, if, contrary to their expectation, no contract was entered into, then the performance of the work is not referable to any contract the terms of which can be ascertained, and the law simply imposes an obligation on the party who made the request to pay a reasonable sum for such work as has been done pursuant to that request, such an obligation sounding in quasi contract or, as we now say, in restitution. Consistently with this solution, the party making the request may find himself liable to pay for work which he would not have had to pay for as such if the anticipated contract had come into existence eg preparatory work which will, if the contract is made, be allowed for in the price of the finished work.

VARIOUS CONTRACTS DOCUMENTS

[18] A contract document can come with many labels, but it is always a question of construction of terms, inclusive of fact to determine whether in law it is valid and binding on the parties, in cases of dispute.

[19] Some of the usual terminologies used for contract documents in construction industries, in addition to what was mentioned earlier, are as follows: (a) letter of intent ('LOI'); (b) memorandum of understanding ('MOU'); (c) joint venture agreement; and (d) letter of award:

(a) letter of intent ('LOI')

Letter of intent is generally construed as a document containing terms and conditions to one party of a proposed contract of the writer or offeror. If it is accepted by the other party, it may become a binding contract. Whether it is binding or not, depends on the construction of the documents as well as the facts when there is a dispute as to its enforceability. Letter of Intent may at times be referred to as 'comfort letter'.

In *Turriff Construction Ltd Regalia Knitting Mills Ltd* [1971] 9 BLR 20 the court on the facts said that a letter of intent is no more than an expression in writing of a party's present intention to enter into a contract at the future date. It is a strict rule of common law that intention to enter into a future contract may not be valid if the terms have elements of uncertainty. Thus, a letter of intent without a final award may not create legal relationship and/or valid and enforceable

agreement (see *Courtney and Fairbrain Ltd v Tolaini Bros Ltd* [1975] WLR 295).

Letter of intent is also at times referred to as letter of understanding or memorandum of understanding. However, letter of intent in most cases at the first instance will be a unilateral offer and only upon acceptance will there be issue such as whether it is enforceable may arise. The other two documents will not be unilateral but similar issues may arise. Among the three, the letter of intent may be a weaker category in law.

In *British Steel Corp v Cleveland Bridge and Engineering Co Ltd British Steel Corp v Cleveland Bridge and Engineering Co Ltd* [1984] 1 All ER 504, the defendant sent a letter of intent to the plaintiff for the manufacture of steel nodes and instructing them to proceed pending the issue of the official form of subcontract. The plaintiff did not agree to the official form and in addition there was no agreement on price as well as delivery date. The plaintiff, notwithstanding a concluded contract proceeded to manufacture one note and delivered to the defendant. The defendant did not pay and the plaintiff sued. The defendant counterclaimed for damages for breach of contract as well as the notes were delivered late. The court held the counterclaim cannot succeed on the grounds that the price of delivery dates had not been agreed and the parties were still negotiating. The plaintiff only succeeded on quantum meruit, for work done;

(b) memorandum of understanding

A memorandum of understanding is usually a bilateral or multilateral parties' agreement to the terms in a non-formal way. It usually reflects the intent of the parties. It is often said to be a gentleman agreement. If the terms are clear and parties have acted upon it, the court may hold that the memorandum of understanding is enforceable. The general rule is that to determine the existence of an intention to create legal relations, the courts looks at the language, the substance and the terms. If it lacks certainty, it may not be enforceable (see *Lim Hong Liang v Tan Kim Lian @ Tan Kim Leng & Anor* [1997] 5 MLJ 157);

(c) letter of award

Letter of award normally relates to a final contract after some exchanges of letters, etc. to secure a construction contract. In construction industry, letter of award denotes the customer (owner, contractor, etc) confirmation of the contract to the person who had succeeded in securing the bid by negotiation or tender or bid, etc.

The letter of award may contain the details of the award, the date of the award, when the contract will be signed. It may also direct the recipient to commence work, as per the award.

It is not unusual for a document to be termed as a letter of award, but in actual fact it is only a 'letter of intent to award'. When the letter of award does not reflect an enforceable agreement, it may create legal issues if there is a dispute.

The recipient of the letter of award can accept the terms but if he suggest variations or new terms, it may amount to counter offer and letter of award may lapse (see *Jones v Daniel* [1894] 2 Ch 332); and

(d) joint venture agreement

Joint venture agreement is a formal mechanism where two or more entities join together to execute a project, etc without being caught with the formalities related to partnership.

Construction joint ventures anticipates cooperation as well as meeting of obligation within the time frame. When construction disputes arises, the issues may become complicated in consequence of other parties involved in the project. Such disputes are best settled if there are provision for ADR among all parties to the project.

[20] In the instant case, the letter of intent dated 8 October 2012 and the letter of acceptance dated 31 October 2012 are crucial documents. Very importantly, both the documents does not carry the plaintiff's name 'Dae Hanguru Infra Sdn Bhd'. Both letters are reproduced as follows:

(a) letter of intent dated 8 October 2012:

Ref: AMMK(D) 747/1-2 (351)

Date: 08th October 2012

CONSORTIUM DAELIM JV

C-406, Glomac Business Centre

Jalan SS6/1, Kelana Jaya

47301 Petaling Jaya

Selangor Darul Ehsan

Attn: Dr. Kim Min Kyu

In the Name Of Allah Most Gracious, Most Merciful

Dear Sirs,

LETTER OF INTENT

THE PROPOSED FINANCING, DESIGNING & CONSTRUCTION OF THE KOTA BHARU — KUALA KRAI EXPRESSWAY ('EXPRESSWAY')

We are a special purpose company incorporated for the purpose of development of a new expressway from Kota Bharu to Kuala Krai in Kelantan. The proposed Expressway would cover a distance of approximately

73km. By virtue thereof, we are the subsidiary of Perbadanan Menteri Besar Kelantan, and authorized by the State Government of Kelantan to undertake the development and construction of the proposed Expressway on the basis of design and build concept.

We would like also to refer to your presentation meeting with us on 10th September 2012, your presentation document titled 'Proposal For Kota Bharu-Kuala Krai Expressway Construction Project' dated September 2012, the meeting of our Management Committee on 14 September 2012 in Kuala Lumpur and lastly but not least your letter dated 18 September 2012 titled 'Proposed Kota Bharu-Kuala Expressway.

Pursuant to the above and by this letter of Intent, we hereby appoint you as the turnkey contractor to finance, design and construct the Expressway.

In furtherance of this intention, Consortium DAELIM JV will nominate and/or incorporate a company which is acceptable by us as the turnkey contractor to implement the project.

The provisional terms (subject to evaluation, negotiation and agreed lump sump contract) are as stated below:

(i) Proposed Project: The Expressway shall be a 4-lane dual carriageway interurban expressway with the design speed of 100 km/hour all in accordance with the Malaysia standards as issued by the Malaysian Highway Authority (JKR R5 standard). The highway shall be designed with closed access and shall have 9 grade separated interchanges at designated locations along its corridor.

(ii) Construction Period: Three (3) years from the date of issuance of the Letter of Award and signing of the relevant Contract Document, based on FIDIC standard form of contract.

(iii) Contract Ceiling Price: RM1,800,000,000.00 (Ringgit Malaysia One Thousand Eight Hundred Million), ('Contract Value') which contract is on a lump sum basis.

(iv) Project Financing: To be fully financed by the turnkey contractor.

(v) Repayment Period: Maximum of fifteen (15) years and the repayments shall commence immediately after physical completion of the Expressway.

(vi) Repayment Amount: The Repayment Amount and Mode of Payment are to be discussed and agreed by both parties. The actual quantum will be determined once the Contract Value and the mode of payment (whether monthly, quarterly, half-yearly or annual payment) has been decided.

(vii) Project Management and other direct related cost including legal and consultancy cost: These costs shall be borne by the turnkey contractor and shall become part of the Contract Value.

(viii) Project Cost Breakdown: The project cost breakdown shall follow

Jabatan Kerja Raya's (JKR's) Preliminary Detailed Abstract (PDA) format and actual cost shall be guided by JKR's rate.

(ix) Performance Bond: You shall provide us as the beneficiary a performance bond amounting to 0.5% (half percent) of the total estimated construction cost upon acceptance of the Letter of Award.

This Letter of Intent shall remain valid for the period of thirty (30) days from the date of its acceptance. However, we may extend the validity of this Letter of Intent subject always to written notification to be issued to you within seven (7) days prior to the expiry of this Letter of Intent.

You shall not assign the rights arising under this Letter of Intent without the prior written approval from us.

We will work towards the issuance of the formal Letter of Award (LOA) within thirty

(30) days from the date of this Letter of Intent. Upon issuance of the LOA, the LOA will automatically supercede this Letter of Intent.

All information in whatever form in relation to this Letter of Intent shall be treated in the strictest confidence by you. You and your associates/affiliates shall not divulge or communicate any information in respect thereof to third parties. Including but not limited to its consultants, agents and/or servants save with our prior written consent. This obligation shall survive the termination or expiration of this Letter of Intent.

This Letter of Intent is sent to you in duplicate. Please indicate your acknowledgment and agreement to the foregoing by signing in the space provided. Please return to this office the original, duly signed and witnessed, where indicated within seven (7) days from the date of this Letter of Intent and retain the copy. Upon acceptance by you we shall meet to develop the milestones to achieve our mutual objectives including the signing of other relevant documents. You may on acceptance of this letter state your requirements as spelt out in your proposal to satisfy yourselves of our capability to achieve our common objectives.

The terms as set out herein are not exhaustive. We may amend and agree to the changes before the issuance of the Letter of Award.

In the meantime, we recommend that both parties should proceed towards finalizing the Heads of Agreement and paving the way to concluding the relevant definitive contract document.

Yours faithfully,

Baldah Toyyibbah (Prasarana) Kelantan Sdn Bhd

t.t.

Dato Husam Musa

Chairman of The Kelantan State Committee for Kota Bharu-Kuala Krai Highway And

A Chairman of Baldah Toyyibah Sdn Bhd

22 Zulqaedah 1433/8 of October 2012

Cc;

B YAB Datuk Bentara Setia Tuan Guru Chief Minister of Kelantan'

(b) letter of acceptance dated 31 October 2012:

Our Ref.: BTPK/KBKK/daelim/10-01

Date: 31st October 2012

C CONSORTIUM DAELIM JV

C406, Glomac Busiess Centre,

Jalan SS6/1, Kelana Jaya,

D Selangor Darul Ehsan

Attn.: Dr. Kim Min Kyu

In the Name Of Allah Most Gracious, Most Merciful

Dear Sir,

E PROPOSED FINANCING, DESIGN AND BUILD OF THE KOTA BAHRU — KUALA KRAI STATE EXPRESSWAY ('EXPRESSWAY')

Letter of Acceptance

F 1. We are pleased to inform that your offer for the above works vide your proposal entitled 'Proposal for Kota Bharu - Kuala Krai Expressway Construction Project' dated September 2012, pursuant to our Letter of Intent dated 8th Oct 2012 is hereby accepted at Guaranteed Maximum Price of Ringgit Malaysia One Thousand and Eight Hundred Million only (RM1,800,000,000.00) ('Provisional Contract Price'). The Contract and Contract Price is subjected to the final negotiation and the execution of the condition of contract ('COC') between us.

G

2. In furtherance of this Letter of Acceptance, Consortium Daelim JV ('CDJV') shall within 14 days inform and provide evidence of the legal status of the joint venturer which is acceptable by us as the Turnkey Contractor to implement the project.

H

3. You are advised that this Letter of Acceptance is part of a binding contract between Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd ('BTSB') and you which will be formalised in the COC.

I

4. You shall provide us with a performance security in the form of Banker's Draft for an amount of RM7,500,000.00 which is about 0.5% of the total estimated construction cost of RM1,500,000,000.00 upon acceptance of this Letter of Acceptance. The Performance Security is forfeited in the event that you fail to comply with Clause 7

of this Letter of Acceptance. However if Clause 7 is complied by you, the Performance Security will remain with us for our use and form part of the Guaranteed Maximum Price.

5. The Date of Possession of the Site as mentioned in the contract terms is on 1st January 2013. However, before the commencement of the Works on Site you are required to present to the Employer all insurances as stipulated in FIDIC Conditions of Contract for EPC Turnkey Projects.

6. Based on the Completion Period of thirty six (36) months, the date for Completion for the whole of the Works under this Contract shall be 31st December 2015.

7. Contract terms and conditions are based on the 'FIDIC Conditions of Contracts for EPC Turnkey Projects with amendments to include financing elements and terms agreeable between us. The Contract Documents shall be ready and executed within three (3) months from the date of this Letter of Acceptance or such other date to be mutually agreed between us.

8. This Letter is sent to you in triplicate. Please return the original and the second copy duly signed and witnessed where indicated to this office within 14 days from the date of this Letter and retain the third copy.

Thank you.

Yours faithfully,

BALDAH TOYYIBAH (PRASARANA) KELANTAN SDN BHD

t.t.

.....

Dato' Husam Bin Musa

Chairman

Cc:

YAB Datuk Bentara Setia Tuan Guru Chief Minister of Kelantan'

HIGH COURT JUDGMENT

[21] It must be said that the learned judge with full appreciation of facts and law have written a judgment with clarity. Though we are not in agreement with the decision of the learned judge, we record our appreciation for the meticulous effort put by the learned judge. This coram had taken much time to consider the submissions of the parties more so to appreciate the technicalities of the law in the subject.

[22] Our judgment must be read with the judgment of the learned judge for comprehensiveness. To save courts time, we reproduce the brief facts of the case as set out by the learned judge, verbatim and it reads as follows:

A. BACKGROUND

[1] This is a case involving a breach of contract between the plaintiff and the two defendants, who were agencies of the Kelantan State Government (KSG), regarding the construction of the Kota Bharu — Kuala Krai Highway Project, ('KBKK project').

[2] The plaintiff's claims against the two defendants (as per the statement of claim) were as follows:

(i) general damage for breach of contract (to be assessed)

(ii) special damage for RM5,488,497 for work done in reliance of the contract.

(iii) interest at the rate of 5%pa on all sums ordered to be paid from 15 November 2013 to date of realisation

(iv) costs and

(v) further and/or other relief that this honorable court deems fit.

[3] In this lengthy trial, nine witnesses testified for the plaintiff; for the first defendant and three for the second defendant. At the end of the trial, this court found that the plaintiff had succeeded in proving its claim against the first defendant on the balance of probability with cost in the amount of RM25,000. However, this court found that the plaintiff failed in its claim against the second defendant. Hence, the claim was dismissed with cost to the second defendant of RM20,000.

[4] Dissatisfied, the first defendant filed an appeal to the Court of Appeal. The plaintiff also filed an appeal against the dismissal of the claim against the second defendant.

[5] These are the grounds for the decision of this court.

B. BRIEF FACTS

[6] The idea of constructing the KBKK project was conceived by the KSG since the 5th Malaysia Plan with the aid of the Federal government. Suffice to say that the plan did not materialise. Sometime in 2012, the KSG decided to revive this project. Upon hearing the news that the KSG had invited interested parties to finance, design and build the highway, a consortium called Consortium Daelim JV (CDJV) which included certain individuals and a company which was incorporated in Korea was formed in order to bid for the project.

[7] Discussions were held between CDJV and officers in the KSG which included representatives of the first defendant. During these discussions the KSG had informed CDJV that it was willing to award the project to CDJV. CDJV was informed that, in order to facilitate the smooth running of the project, inter alia, the

KSG would use the first defendant, which was a private limited company registered under the Companies Act 1956, as a special purpose vehicle (SPV) for the implementation of the KBKK Project. A

[8] CDJV (and subsequently the plaintiff) was under the impression as relayed by the KSG, that the second defendant was the principal corporation entrusted with the implementation of the project. However, as found by this court official dealings in respect of the KBKK Project were solely with the first defendant which was a wholly owned subsidiary and SPV of the second defendant. B

[9] On 8 October 2012 (pp 24–27 of B1), the first defendant sent a letter to CDJV appointing Consortium Daelim JV ('CDJV') as the turnkey contractor to finance, design and construct the KB-KK expressway from Kota Bharu to Kuala Krai in Kelantan. In the same letter, CDJV was instructed to nominate and/or incorporate a company acceptable to the first defendant as the turnkey contractor to implement the project. C

[10] On 10 October 2012 (p 28 of B1), CDJV sent a letter to the first defendant communicating its acceptance of the terms and conditions contained in the said letter. D

[11] On 31 October 2012 (pp 30–31 of B1), the first defendant sent a letter of acceptence, accepting CDJV's (and subsequently the plaintiff's) 'Proposal for Kota Bharu — Kuala Krai Expressway Construction Project' at a Guaranteed Maximum Price of Ringgit Malaysia One Thousand and Eight Hundred Million only (RM1,800,000,000). E

[12] The said letter of acceptance instructed CDJV to provide evidence of the legal status of the joint venturer acceptable to the first defendant as the Turnkey Contractor for the project.

[13] In addition to the above, the letter of acceptance stated, inter alia, that letter of acceptance was part of a binding contract which would be formalised in the conditions of contract and the contract terms and conditions are based on the FIDIC conditions of contract for EPC/Turnkey Projects with amendments to include financing elements and terms agreeable between the parties. F

[14] In a memorandum dated 21 November 2012 (p 32 of B1), CDJV acknowledged receipt of the letter of acceptance and agreed that all terms and conditions of the said letter of acceptance would be read and construed as part of the Contract. G

[15] On 5 December 2012 (pp 59–60 of B1), CDJV wrote to the first defendant and informed that the legal entity or Turnkey Contractor responsible for the implementation of the project would be the plaintiff. H

[16] On 2 May 2013 (p 205 of B1) the KSG wrote to the first defendant informing the first defendant that all financial liabilities under the Project (originally agreed to be under the KSG) was now to be solely borne by the first defendant.

[17] As a result CDJV (and subsequently the plaintiff) had incurred substantial costs amounting to RM5,227,240 (excluding the financing costs) to carry out preliminary works. I

[18] On 18 February 2013 (pp 33–37 of B1) the first defendant wrote a letter to the plaintiff titled 'Supplementary to Letter of Acceptance dated 31 October 2012 [Ref:

BTPK/KBKK/daelim/10-01] ('the first letter of acceptance') where the first defendant had agreed on several issues including the contractor would be Dae Hanguru Infra Sdn Bhd (the plaintiff) (with some exception) and that the date for execution of the conditions of contract would be 27 February 2013 or such other date to be mutually agreed between the parties and that the supplementary to the letter of acceptance would form part of the contract document.

[19] On 1 March 2013 (pp 61–68 of B1), the plaintiff wrote to the first defendant stating its position and informed the first defendant that it would not be able to sign the supplementary to letter of acceptance until a number of issues were discussed and mutually agreed by both parties. The plaintiff also informed the first defendant that it had already commensed work on the detailed engineering design and should be compensated for these works if the contract was not executed.

[20] There was no direct response from the first defendant to the plaintiff's letter of 1 March 2013 and to the issues raised therein.

[21] There were several initiatives initiated by the plaintiff to move on and continue with the further implementation of the project and the execution of the contract documents. Towards that end the plaintiff sent several letters to the first defendant, the second defendant and the first defendant's Consultant, Jurutera Perunding Zakie (JPZ). Two letters were also sent to the Menteri Besar of Kelantan on 5 September 2013 (pp 75–79 of B1) and 20 September 2013 (pp 208–209 of B1). In these letters the plaintiff sought from the first and/or second defendants vital information, documents and meetings to resolve relevant matters related to the financing and successful implementation of the project. A newspaper report in the Harakah dated 9 September 2013 that a 'new consultant' had been appointed for the project by the KSG prompted the plaintiff to seek some response. However there was no satisfactory response received from the first and/or second defendants to those requests.

[22] On 13 October 2013 (p 40 of B1) the first defendant wrote to the plaintiff stating that it was unable to continue negotiations due to the plaintiffs failure to comply with the letter of acceptance dated 31 October 2012 and/or the supplementary to the letter of acceptance dated 18 February 2013. Further the letter stated that all negotiations had lapsed and expired with effect from 1 July 2013 and that the first defendant was free to enter into negotiation with other parties in respect of the project.

C. ISSUES FOR THE DETERMINATION OF THE COURT

[23] It was the plaintiff's case that there was a contract between the first defendant and the plaintiff and that the first defendant had repudiated/breached the contract, thereby rendering the plaintiff suffering losses and loss of profit. The first defendant argued that there was no contract between them in the first place but there were only *negotiations*. (Emphasis added.)

[24] The first defendant claimed that the negotiations failed because inter alia, the plaintiff introduced new terms, and that the plaintiff had not met the deadline set to inform the first defendant in respect of its decision on whether to comply with the original provision agreed to earlier.

[25] Further the first defendant claimed that although Dato' Husam was the Chairman of the first defendant, all along he had acted on a frolic of his own without the KSGs' approval.

[26] The plaintiff also, claimed that since the first defendant is wholly owned by the second defendant, and by virtue of the second defendant's active involvement in the project, the veil of corporation of the second defendant can be pierced to attach liability on to the second defendant as well. Hence, this suit against the second defendant too.

[27] The broad issues to be determined by the court were as follows:

(a) whether there was a concluded contract between the plaintiff and the first defendant;

(b) whether CDJV and plaintiff are the 'same' entity;

(c) whether there was a repudiation of the contract by the first defendant;

(d) whether the plaintiff suffered losses and entitled to compensation.

(e) whether the second defendant was also liable (piercing the corporate veil).

[23] The grounds of judgment as summarised and placed before us as follows:

First issue: Whether there was a contract established between the plaintiff and the first defendant

1. The first defendant argued that there was no contract established, but only negotiations. However, the plaintiff argued otherwise.

2. The court agreed with the plaintiff that it is trite that a contract must be construed from the factual matrix in which it was formed. Hence, a contract must not be read in isolation, without the benefit of its genesis and purpose.

3. The court of the opinion that there was a contract between parties based on following reasons:

(a) the admission by the first defendant in its re-amended defence dated 25 September 2015: The court was of the view that the first defendant's averment in para 5 constituted a clear admission that there existed a contract between CDJV and the first defendant. That admission was reinforced by a finding made by the court earlier in its grounds of judgment dated 2 May 2016 when dismissing the first defendant's application to amend the first defendant's re-amended defence on 2 March 2016.

(b) relevant correspondences in which the language used, conduct of parties, etc showed the existence of the contract:

(i) letter of intent dated 8 October 2012 from the first defendant to CDJV: The court agreed with the plaintiff that the strong words used by the first defendant in the said Letter of Intent, namely 'we hereby appoint you as the turnkey contractor' clearly proved that the first defendant has already chosen CDJV as its appointed

contractor and intended to create legal relations with the company incorporated by CDJV to implement the project;

(ii) letter of acceptance dated 31 October 2012 by the first defendant: Upon acceptance by the first defendant of CDJV's offer, based on the law of contract ie offer and acceptance, a contract had come into existence. The court had considered the contents of the said Letter of Acceptance which clearly proved that a contract had come into existence between CDJC and the first defendant. The words 'hereby accepted' and 'is part of a binding contract' are of great significance. It was clear that the first defendant had an intention to be bound in law by the said letter of acceptance. The court was of the considered opinion that it was undoubtedly clear that the execution of the conditions of contract ('COC') was merely to formalise the agreement already concluded between parties. The contents of the said letter of acceptance was clearly indicative of a valid and binding contract which existed between CDJV and the first defendant;

(iii) letter by CDJV to the first defendant dated 19 November 2012: Based on the acknowledgment prepared by the first defendant which CDJV was asked to execute, it was clear that CDJV had been appointed as the contractor for the said project and a contract had already been formed;

(iv) letters by the first defendant's Representative, Jurutera Perunding Zaki (JPZ): There were numerous letters by JPZ to the plaintiff confirming that for all intents and purposes, the plaintiff had been appointed by the first defendant as the contractor of the said project. The court cannot come to any other conclusion that it was patently clear that the plaintiff was the contractor appointed by the first defendant. The court further found the fact that JPZ was asking the plaintiff to comply with the 'original provisions' clearly showed that the parties were of the view that a binding contract had already come into existence and the material terms and conditions had already been agreed upon;

(v) supplementary letters of acceptance by the first defendant to CDJV dated 18 February 2013: The words used by the first defendant in para 10, that 'If the contract cannot be executed by 31st March 2013, the Contract shall be deemed terminated' clearly proved that a contract had already come into existence. If parties were still merely negotiating, there would be no need for any termination. There would be no necessity for the first defendant to agree to compensate CDJV/ the plaintiff for costs incurred in respect of works done by the plaintiff. The first defendant had to agree to compensate CDJV and the plaintiff because a valid and binding contract in law between parties had already come into existence;

(vi) the formal contract document: The plaintiff's name as the contractor for the said project in the said contract document proved that the plaintiff had been appointed as the contractor for the said

project. It was further recorded under item 9.0, Preparation and Compilation of Contract Agreement that the plaintiff was to decide the person who would sign the contract agreement.
It is the opinion of the court that if parties were still negotiating, the details in respect of the signing of the contract agreement would only be discussed one negotiations were over.

(c) instructions were given to the plaintiff and executed accordingly: The court's view that the fact that there was a valid contract was further supported by documents which showed that the plaintiff was instructed by the first defendant to do work in respect of the project and accordingly, work was executed by the plaintiff. SD1, SD2 & SD3, the first defendant's witnesses had also confirmed the work was done by the first defendant.

Second issue: Whether CDJV and plaintiff are the 'same' entity

4. Following the first defendant's request, CDJV had incorporated the plaintiff. On 5 December 2012, CDJV informed the first defendant that the turnkey contractor responsible to implement the project will be the plaintiff and that the plaintiff was registered on 3 December 2012.

5. The first defendant by a letter dated 18 February 2013 had agreed to the appointment of the plaintiff provided the equity shareholders of the plaintiff were the same entities within CDJV.

6. The court opined that the contract which was concluded on 31 October 2012 was entered into by CDJV on behalf of the plaintiff prior to its formation as per the law in *The Golf Cheque Book's Sdn Bhd & Anor v Nilai Springs Bhd* [2006] 1 MLJ 554.

7. The conduct of the plaintiff satisfying the contract can be seen when the plaintiff actively took charge and wrote numerous correspondences to JPZ and the first defendant, attending site meetings and also commencing works in executing the said contract.

8. The court was of the considered opinion that all this goes to show that the incorporation of the plaintiff as the turnkey contractor for the said project on behalf of CDJV was acceptable to the first defendant.

Third issue: Whether the contract was repudiated by the first defendant

9. The court was of the considered view that if parties were still merely in negotiations as alleged, there was no obligation upon the plaintiff to comply with any conditions whatsoever given that no valid contract had been concluded yet and there would also be no binding conditions to be complied with by parties yet.

10. The court opined that the said repudiation letter dated 31 October 2013 in itself proved that there was already legal obligations agreed between parties pursuant to a contract already reached between them.

11. The court agreed with the plaintiff that if the first defendant's complaint was that some conditions in respect of the said Contract were allegedly not met by the plaintiff, the first defendant ought to have terminated the Contract reached between them.

12. This court also agreed with the plaintiff that if the first defendant's complaint was that some conditions in respect of the said contract were allegedly not met by the plaintiff, the first defendant ought to have terminated the contract reached between them.

13. The court also opined that further conduct of the first defendant perhaps motivated them to repudiate the contract. Evidence was lead that the KSG had withdrawn its financial support to the first defendant sometime in 2013, thereby undermining the first defendant's ability to continue with the project.

14. The court made a finding of fact that there was an existence of a contract and that the contract was repudiated against the plaintiff.

15. As the plaintiff was in the shoes of CDJV, it follows that such repudiation was against the plaintiff.

Other issues

16. On the issue of alleged new terms was introduced by the plaintiff, the court took cognisance of the plaintiff's argument that the supplementary agreements were merely a legally binding and bankable mechanism of the implementation of the repayment plan which was envisages by parties right from the start.

17. The court had perused all the relevant correspondence from Daelim/CDJV and the response from the KSG through Dato' Husam that showed that right from the start Daelim/CDJV had insisted that the repayment plan by the KSG was critical. This was agreed by all parties in the minutes of the meeting of 15 February 2013. This court agreed that the plaintiff's letters were merely repeating this requirement.

18. Further, SP8 also gave evidence to the effect that the plaintiff did not introduce new terms.

19. On the allegation that the plaintiff had not met the deadline set to inform the first defendant in respect of its decision on whether to comply with the original provisions, the court noted that in light of the chronology of events, it was patently clear that the first defendant's deadline was extended to 30 June 2013 and the plaintiff had given its decision and confirmation on 13 June 2013 which was before the deadline set.

20. The court noted that SD1 during cross-examination had confirmed that the deadline was extended to 30 June 2013 and that there was no letter by the first defendant after the plaintiff's letter of 13 June 2013 to the first defendant.

21. On the issue that Dato' Husam had allegedly acted on the frolic of his own without the KSG's sanction, the court noted the plaintiff's objection that this issue was never pleaded by the first defendant.

22. The court opined that whether or not the KSG's sanction was obtained is irrelevant. The court merely concerned whether or not there was a contract formed between the plaintiff and the first defendant in the project.

Fourth issue: Whether the plaintiff suffered losses and entitled to compensation

23. The court was satisfied that there was a wrongful repudiation and breach of contract and that the plaintiff had suffered losses.

24. Hence, the plaintiff are entitled to claim for damages which was to be assessed by the deputy registrar.

Fifth issue: Whether the second defendant was liable (piercing the corporate veil)

25. The second defendant is incorporated under the Perbadanan Menteri Besar Kelantan Enactment (Menteri Besar Incorporation Enactment 1950).

26. The court was satisfied that the second defendant was not involved at all and hence not a party to the purported contract.

27. The court referred to letter of acceptance, it was obvious that there was nothing mentioned about the second defendant. Not only the second defendant was not mentioned nor named, the letter was not even copied to the second defendant.

28. Having perused further the evidence of the Defendant's witnesses, DW1, DW2, DW3, DW5 & DW7 were very clear and consistent in their testimonies that the second defendant was not involved in the project at all.

29. The evidence of DW5 clearly showed the non involvement of the second defendant in this project.

30. None of the correspondences between the plaintiff and the first defendant were copied to the second defendant nor DW4 by either party.

31. The court satisfied that there was no privity of contract between the plaintiff and the second defendant.

Sixth issue: Was there a concluded contract between the plaintiff and the second defendant

32. There was no concluded contract between the plaintiff and the second defendant.

33. This was because the element of offer, acceptance and consideration which are necessary for the formation of a contract were clearly absent between the plaintiff and the 2nd Defendant.

34. In the first place, the second defendant was not involved at all and hence was not a party to the contract.

35. There was also no breach of any obligations whatsoever because the contract did not exist in the first place.

Seventh issue: Did the first defendant act for or on behalf of the second defendant

36. The court found that from the evidence adduced, that the first defendant acted on behalf of himself and the KSG.

37. The CDJV's proposal was evaluated by the said committee appointed by the first defendant and not by the second defendant.

38. The findings by the Jawatankuasa Teknikal dan Kewangan were not presented to the second defendant or even the KSG for their views or approval. They were directly report to the first defendant.

39. This clearly shows the second defendant had no role in this project.

40. The approval of the second defendant was clearly not required nor was the second defendant consulted in this project.

41. Based on all the evidence, the court found that there was no evidence to support the proposition that the second defendant had acted on behalf of the first defendant nor on behalf of the KSG in this project.

Eighth issue: Second defendant (PMBK) and Kelantan State Government (KSG) are two different entities

42. It must be stress here that the second defendant or PMBK is a separate legal entity from KSG. It was separate from KSG.

43. The second defendant is a corporation established under s 3 (1) of the Menteri Besar (Incorporation) Enactment 1950.

44. The Menteri Besar of Kelantan as a corporation is assisted by an advisory committee to ensure transparency on any decision made.

45. In contrast, the KSG comprises the State Executive Councils and the Councils of State.

46. It is evident that the Menteri Besar could not constitute or form the State Government of Kelantan alone. The State Government, the Menteri Besar, KDYMM Tuanku Sultan Kelantan, State Executive Council do not constitute the second defendant.

47. The court was satisfied that from the evidence, although the second defendant was on other occasions entrusted by the KSG with the implementation of other infrastructure development projects, this specific Project was never given to the second defendant for it to be implemented.

48. The court also agreed that although the first defendant is a wholly owned subsidiary of the second defendant, the fact and law remain that the 1st and second defendant are separate legal entities.

49. It showed that DW4 was entitled to run and look into the interest of the first defendant in line with his position as the first defendant's director.

50. The court is not willing to depart from the principle in Solomon, as the fact of this case does not allow this court to do so in the sense that the evidence adduced so far did not give any basis for the court to lift the corporate veil and attach liability on the second defendant.

[24] The memorandum of appeal of the first defendant in Appeal No 431 reads as follows:

1. The Learned Judicial Commissioner erred in law and/or in fact in holding that the Appellant was liable to the Respondent for wrongful repudiation of contract and/or breach of contract and that damages be assessed by the Registrar with interest and costs to be paid to the Respondent.

2. The Learned Judicial Commissioner erred in law and/or in fact in holding that there was a concluded contract to finance, design and build a highway connecting Kota Bharu to Kuala Krai (the 'KBKK Project') between the Appellant and Consortium Daelim JV ('CDJV').

3. The Learned Judicial Commissioner failed to appreciate that even if a valid and binding contract existed between the Appellant and CDJV (which is denied), the express term of the contract that required a joint venturer which was acceptable to the Appellant as the Turnkey Contractor was never satisfied and as such, the Appellant was entitled to bring the said contract to an end.

4. The Learned Judicial Commissioner erred in law and/or in fact in holding that the alleged contract between the Appellant and CDJV (which is denied) somehow became a concluded contract between the Appellant and the Respondent when inter alia:

4.1 there was no legal basis for CDJV to suddenly be substituted with the Respondent as a contracting party;

4.2 on the evidence, the Appellant had at all material times only intended to create legal relations and/or had only contracted with CDJV in respect of the KBKK Project; and

4.3 there was never any novation or even a purported assignment of the rights, obligations and liabilities of CDJV under the alleged contract with the Appellant to the Respondent in respect of the KBKK Project.

5. The Learned Judicial Commissioner erred in law and/or in fact as he failed to appreciate that there was no concluded contract between the Appellant and the Respondent either:

5.1 by way of a legally valid substitution of the Respondent for CDJV M a contracting party to the alleged contract; or

5.2 any direct contract between the Appellant and the Respondent upon the terms contained in the draft Contract Document dated 30.1.2013.

6. The Learned Judicial Commissioner erred in law and/or in fact in relying on the principle of promoter and successor and/or on section 35(1) of the Companies Act 1965 and holding that the benefits and obligations of the alleged contract were taken over by the Respondent on behalf of CDJV after the Respondent's formation when inter alia:

6.1 there was no such averment pleaded by the Respondent in the Re-Amended Statement of Claim;

6.2 there was no evidence led at trial that CDJV was a promoter and the Appellant, its successor;

6.3 the Respondent's case that the Respondent was the successor of CDJV and would be the contracting party with the Appellant was never put to the Appellant's witnesses at trial;

6.4 this finding is inconsistent with the learned Judicial Commissioner's finding that there was already a concluded contract between the Appellant and CDJV prior to the Respondent's formation;

6.5 there was no evidence of the Respondent ratifying any contract that was entered into prior to its formation in respect of the KBKK Project; and

6.6 on the circumstances of this case, the provisions of section 35(1) of the Companies Act 1965 are in any event inapplicable.

7. The Learned Judicial Commissioner erred in law and/or in fact in holding that the works carried out by the Respondent supported the existence of a valid and binding contract between the Appellant and the Respondent.

7.1 The Learned Judicial Commissioner failed to appreciate that works carried out by the Respondent were not carried out *under* the alleged contract between the Appellant and CDJV, to which the Respondent was not a party.

7.2 The said works carried out by the Respondent were preliminary works in respect of the alleged contract between the Appellant and CDJV but were carried out either:

7.2.1 under a separate contract between the Appellant and the Respondent; or

7.2.2 alternatively, were works carried out by the Respondent upon the request of the Appellant pursuant to an implied contract in respect of which a claim may be found in *quantum meruit* for payment therefor.

8. The Learned Judicial Commissioner erred in law and/or in fact in holding that by its letter dated 13.10.2013, the Appellant had wrongfully repudiated the alleged contract between the Appellant and the Respondent.

9. The Learned Judicial Commissioner further erred in law and/or fact in ordering that damages be assessed against the Appellant.

9.1 The trial of the action was never bifurcated into separate proceedings for the determination of liability and damages;

9.2 The parties had agreed that the issues of liability and damages were to be heard at the same time;

9.3 In ordering damages to be assessed, the Respondent is wrongly and unfairly afforded a second opportunity to lead evidence on the issue of damages.

10. The decision of the Learned Judicial Commissioner was perverse in that, having regard to the evidence adduced, no reasonable tribunal could have reached a decision that the Appellant would be liable in damages to the Respondent for breach of an alleged contract entered into between the Appellant with CDJV.

11. The Learned Judicial Commissioner had taken into account irrelevant considerations and failed to take into account relevant considerations.

12. The decision of the Learned Judicial Commissioner was in the circumstances of this case, against the weight of all the evidence and involved a misapplication of the law to the facts.

[25] The memorandum of appeal of the plaintiff in the Appeal No 499 reads as follows:

1. The Learned Judicial Commissioner ('JC') erred in law in applying the wrong legal test to determine whether the corporate veil of Baldah Toyyibah (Prasarana) Sdn Bhd ('Baldah') ought to be lifted/pierced:-

i. by applying the doctrine of privity of contract in finding that the Respondent/2nd Defendant was not involved at all and hence not a party to the purported contract, when the Appellant/Plaintiff's claim against the Respondent/2nd Defendant was grounded in the lifting/piercing of the corporate veil of Baldah;

ii. by first identifying the essential elements for the formation of a contract and thereafter, in the absence of these elements, determining that there was no concluded contract between the Appellant/Plaintiff and the Respondent/2nd Defendant, when these legal principles were wholly irrelevant in determining whether the Respondent/2nd Defendant ought to be also liable for breach of contract by Baldah; and

iii. by holding that only when a company within a group is used to as a vehicle to perpetuate fraud and where there is evidence of either actual fraud or some conduct amounting to fraud in equity can the lifting/piercing of the corporate veil be justified.

2. The Learned JC erred in law in failing to apply the correct legal test as set out in *Prest v Prest and Others* and applied by the Federal Court in *Gurbachan Singh s/o Bagawan Singh & Others v Vellasamy s/o Pennusamy & Others* which hold the broader principle that the corporate veil may be lifted/pierced to prevent the abuse of corporate legal personality where a company interposes another entity to evade the law or to frustrate its enforcement, and also whether there were special circumstances for doing so, and instead unquestioningly accepting the test proffered by the Respondent/2nd Defendant that fraud or equitable fraud was the sole and/or indispensable basis for the lifting/piercing of the corporate veil.

3. The Learned JC erred in law and/or in fact in refusing to lift/pierce the corporate veil by failing to appreciate that based on the evidence and the law, for all intents and purposes the Respondent/2nd Defendant was the principal party through whose wholly owned subsidiary, Baldah, a special purpose vehicle, the Kelantan State Government ('KSG') implemented the Kota Bharu-Kuala Krai Highway ('KBKK') Project.

4. As a result of applying the wrong test wherein fraud is the sole basis for the lifting or piercing of the corporate veil, the Learned JC erred by failing to adequately consider and evaluate the evidence in favour of the Appellant/Plaintiff's case that the Respondent/2nd Defendant which was actively involved in the entire KBKK Project was now abusing its corporate legal personality to evade the law and to frustrate its enforcement. The evidence includes the following:-

i. Key documents were copied to the Respondent/2nd Defendant;

ii. Senior personnel of the Respondent/2nd Defendant were also involved in the operations of Baldah;

iii. All key decisions in relation to the KBKK Project were made by the Project Management Consultants Jurutera Perunding Zakie ('JPZ') in consultation with and approved by the Respondent/2nd Defendant;

iv. The involvement of the Respondent/2nd Defendant in the scrutiny and approval of payments to JPZ for consultancy fees;

v. The financial standing of Baldah which had a paid up capital of only RM1 million undertaking a RM1.8 billion project which realistically could not have been undertaken without the full support and involvement of the Respondent/2nd Defendant being the relevant State Agency;

vi. The request for the Respondent/2nd Defendant's Annual Report by the promoters of the Appellant/Plaintiff at the very start of the negotiations signifying that the Respondent/2nd Defendant's financial standing was vital to guarantee the financial viability of the KBKK Project and the ability of Baldah to honour its financial obligations;

vii. The oral testimony of PW8 Dato' Husam Bin Musa who was considered by the Learned JC as the person who is involved whose evidence included the following:-

a) The State Exco formed a special committee chaired by PW8 himself. Officers from the Respondent/2nd Defendant and other professionals through this special committee made recommendations to the State Government on the selection of bidders.

b) The KSG decided to undertake the KBKK Project through the Respondent/2nd Defendant by the use of Baldah, a wholly owned Special Purpose Vehicle.

c) From the outset on the request of Daelim Industrial Pte Ltd ('Daelim'), the KSG through Baldah and the Respondent/2nd Defendant was committed to implementing a legally binding repayment program guaranteed by the State Government.

d) The involvement and responsibility of the Respondent/2nd Defendant in the repayment to the contractor from proceeds from the mining concession. The mining application was to be done in the name of Respondent/2nd Defendant.

e) The Respondent/2nd Defendant is part of the arrangement in the Project. The Respondent/2nd Defendant is the principal and cannot evade its responsibility. The Respondent/2nd Defendant has a financial obligation if the arrangement failed.

f) The late Tok Guru Nik Aziz would never have agreed to the Respondent/2nd Defendant washing its hands and saying it had nothing to do with Baldah.

5. The oral testimony of DW3 Ir Mohd Zaki bin Mat, the Project Manager whom the Learned JC regarded as 'truthful and reliable' which included the following:-

a) The Respondent/2nd Defendant was actively involved in the Project from the beginning and this was part of the original proposal by Daelim.

b) Baldah with RM 1 million paid-up capital could not possibly undertake the Project without financial support and resources of the State Government or its agencies in the repayment of the cost of the Project.

c) The source of revenue from State Government was so important and essential and it was incorporated in the Conditions of Contract.

d) The Respondent/2nd Defendant and its subsidiaries were to be involved in the issue of source of revenue.

e) Baldah being a subsidiary of the Respondent/2nd Defendant could not act independently and were always acting under the supervision of the Respondent/2nd Defendant in the Project.

f) The Respondent/2nd Defendant was actively involved in the Project and En. Sanusi bin Haji Othman who was at the material time Chief Operating Officer and acting Chief Executive Officer of the Respondent/2nd Defendant was present in all important meetings.

g) Payments were undertaken through the Respondent/2nd Defendant and first approved by the Respondent/2nd Defendant before they are made.

6. The Learned JC erred when he failed to recognise the special relationship between the Respondent/2nd Defendant, a State Agency established under a State Enactment, and Baldah, its wholly owned subsidiary (with paid up capital of only RM1 million) and which is undertaking a billion ringgit project intended to be financed by the state resources, as a special circumstance and further in the interest of justice, warranting the lifting/piercing of the corporate veil even without the existence of fraud or equitable fraud on the part of the Respondent/2nd Defendant.'

[26] We have read the appeal records and the able submissions of the parties. After much consideration to the learned counsel for the plaintiff, we take the view that the learned trial judge after hearing the evidence ought to have dismissed the plaintiff's claim in limine. Our reasons, inter alia, are as follows:

(a) firstly, we must say that the construction agreements and/or contracts have its own peculiarity, practice and acceptance. There are different types of construction contracts. Big projects will have multiple contracting parties. To avoid the strict provision of the law, all parties if they have agreed to arbitration clause, the arbitrators will have a mandate to treat various parties as having an intention to create legal obligations as well as *consensus ad idem*, though not all parties have agreed or signed all agreements. In essence, the privity of contract is given lesser importance and arbitrators would take a holistic approach (see *Janab's Key To International Arbitration*, (2016) ch 2);

(b) the most crucial document is the letter of intent dated 8 October 2012 and letter of acceptance dated 31 October 2012. It was the contention of

the counsel for the first defendant that there was no contract entered into between the first defendant and plaintiff. We agree with the first defendant's counsel that if there was any agreement and/or contract in respect of the project, it was between the consortium (which consisted of several members) and the first defendant. Very importantly, the plaintiff was never a member of the consortium at the material time as the plaintiff was yet to be incorporated. Thus, the issue of 'consensus ad idem' will be lacking to give the status of a contract to some loose arrangements. The fact that, subsequently the plaintiff was nominated as the consortium's contractor to implement the project will not regularise the lack of consensus ad idem principle which is essential to sustain a valid contract;

(c) it must also be noted that there was an attempt to substitute the consortium for the plaintiff as the contracting party. However, it was not successful and there was no clear evidence of novation either, according to law; and

(d) taking into consideration the totality of the evidence and the preliminary jurisprudence which we have advocated, we do not think that the plaintiff had established that there is a valid and enforceable contract under the law to seek the relief as prayed by the plaintiff. In addition, the plaintiff's prayer are focussed on an enforceable contract and did not mention lesser form of agreements where some payments could be made under other heads recognised under the CA 1950.

[27] For reasons stated above, the first defendant's Appeal No 431 is allowed with costs and the plaintiffs Appeal No 499 is dismissed with costs.

We hereby order so.

First defendant's appeal allowed with costs; plaintiff's appeal dismissed with costs.

Reported by Dzulqarnain bin Ab Fatar